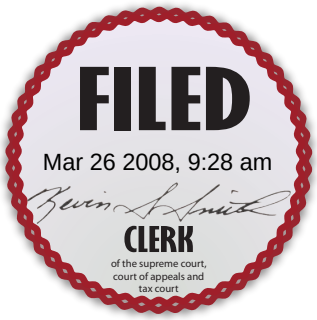

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IN THE
COURT OF APPEALS OF INDIANA

RAGEING WARR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0706-CR-350
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0508-FD-146378

March 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Rageing Warr ("Warr") appeals her conviction, after a jury trial, of resisting law enforcement, as a class D felony.[1]

We affirm.

ISSUE

Whether Warr's waiver of her right to counsel was made knowingly, intelligently, and voluntarily.

FACTS

On or about August 25, 2005,[2] under a single information, the State charged Warr with resisting law enforcement, as a class D felony; and disorderly conduct, as a class B misdemeanor.[3] The trial court conducted a jury trial on September 13, 2006. Before the trial commenced, the trial court advised Warr of the perils of proceeding *pro se* during the following colloquy.

> Court: * * * Ma'am, you and I have not met before. You are choosing to represent yourself which is your right. I'm sure . . . whoever was on the bench has already had some discussions with you but representing yourself very rarely turns out well. I have no opinion on your guilt or innocence. I've just seen your file today and it's going to be the jury that's actually going to decide your guilt or innocence and they're not here to be part of this discussion so they're going to start with a clean slate and that's the way it's supposed to be.
>
> * * *

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[1] Ind. Code § 35-44-3-3.

[2] The parties, in their respective briefs, state that the State filed the charges on August 25, 2005; however, the Justice Information Case Chronology, (Warr's App. 4), indicates that the State filed the charges on August 26, 2005.

[3] I.C. § 35-45-1-3.

. . . I can't serve as your lawyer during this and . . . the same rules of evidence that apply in any case apply to this. The State's going to make objections based upon technical rules of evidence. You have a right to do that also. But your [sic] disadvantaging yourself because you, perhaps, and probably don't know those rules of evidence. I suppose if I cut myself pretty badly I'd have a right to stitch it up myself but I wouldn't do that, I'd go find a doctor [']cause I'd get a better result. Um, but at some point during this whole thing I think you're going to have questions about what the law is and I can't answer those questions because I'm not your attorney and so what I want to do and I understand this is a departure perhaps from what Judge Goodman wanted to do [sic]. I want one of the public defenders who are all qualified attorneys, good attorneys in my experience, to be present in the courtroom. You can represent yourself, you can decide whether to make objections. If you're unsure of what to do, you can have a brief moment outside the presence of the jury if appropriate to ask this lawyer questions about how this works or what this means. Not to the point where we bog the whole thing down and can't do anything but otherwise I don't see how we're going to get through the trial. * * *

* * * The lawyer won't represent you. They'll [sic] be available in the courtroom. You see this, I'm not too big on what happens on t.v. because most of that is a bunch of hooey but in some of the major federal cases, you may have seen that where a Defendant . . . decided to represent themselves [sic] but the court orders that a competent attorney be available to that Defendant so when the Defendant has questions about what the law is, they can ask the attorney. You can't ask me because I can't be your attorney and you can't ask the prosecutor [']cause they're on the other side of the case and you can't go back and forth between being represented and unrepresented but I don't, I think you're going to be in such a bind if you don't have somebody to talk to that I don't want us to have to go through this again, whatever the result is so I want the public defender to make an attorney available and if you . . . have a question you need to ask them, you can tell me that and I'll give you some time to do it. You need to move slow so that whatever's going on when the jury's in here, if it's not something the jury should hear [']cause it might hurt you or it might confuse them, you need to kind of give me time to do something about that. Okay? You with me?

Warr: I just got a problem with you telling me that I can't defend myself the way that I need to defend myself against these people . . . .

> Court: I didn't, I didn't, first of all, I didn't just tell you that. I said you can defend yourself. I did say I doubt if you're competent to defend yourself because you're not an attorney ['']cause you don't know the law. Just as if I went over to federal court to try a securities case today, even though I am an attorney, I would not be competent ['']cause I don't know securities law and I'm saying that somewhere along the way during the whole thing you're probably going to have questions about what the law is and nobody's going to be here to answer them for you and that's why I want an attorney in the room that you can talk to if you want to. You don't have to. But if we get halfway through, you have the questions and there's nobody here, then we can't get there from here and we can't finish. You with me?
>
> Warr: Yes.

(Tr. 22-25). Warr elected to proceed *pro se*, and the trial court appointed standby counsel from the Office of the Public Defender to assist her. The trial commenced and, thereafter, the jury convicted Warr of disorderly conduct. The jury, however, could not reach a verdict on resisting law enforcement, so the trial court declared a mistrial as to that charge.

Approximately four months later, on January 3, 2007, the State retried its case before a new presiding judge.[4] Before the trial began, the trial court established for the record that Warr intended to represent herself, as evidenced by the following exchange:

> Court: I have been informed through reviewing the case file that you have requested a jury trial and that it is set for today; is that your understanding as well?
>
> Warr: Yes.
>
> Court: It's also been indicated to me through the file that the previous judge had appointed Mr. Gerber who is here with you as [st]and by

[4] The Honorable William Howell presided over Warr's first trial, and the Honorable Lisa Borges presided over her second.

> counsel or advisory counsel, and that you had previously indicated you wished to represent yourself or go pro se. Is that still the case?
>
> Warr: Yes.
>
> Court: So it's my understanding, then, that you will be representing yourself today, but that you will have Mr. Gerber available to you during the trial should you wish to avail yourself of any advice from him at any time. Do you have any questions about the standby counsel or advisory rule that he has or with regard to that we need to discuss?
>
> Warr: No, I don't.
>
> Court: So then the record would show that the defendant is here Pro Se representing herself . . . . * * *

(Tr. 377-78).

The trial judge then addressed some preliminary matters and the trial commenced. The State and Warr presented their cases in chief. During Warr's presentation, she disavowed her advisory counsel. Then, during her closing, she made the following statement to the jury:

> I'm not here because I want to represent myself, I am just here because I am doing the best that I could do to get all the facts out to you because I don't believe that I have true representation. There is such a thing called under-representation, miss-representation [sic] and malicious prosecution.

(Tr. 622-23). The State objected to Warr's statement and the trial court ordered it stricken. When Warr persisted in claiming that she had been denied counsel, the trial court responded, "Ms. Warr, you have been given [the opportunity] to avail yourself of counsel. You have advisory counsel here which you have refused. You have been offered a public defender which you have refused." (Tr. 625). Thereafter, the jury deliberated and convicted Warr of resisting law enforcement.

At the sentencing hearing on February 9, 2007, the trial court imposed the following sentence: (1) for resisting law enforcement, a 545-day sentence, with 180 days executed, and 365 days suspended to probation, with probation to terminate upon completion of eighty hours of community service work; and (2) for disorderly conduct, a 180-day sentence, to be served concurrently with the sentence for resisting law enforcement. Warr now appeals.

DECISION

Warr argues that her waiver of right to counsel was not knowingly, intelligently, and voluntarily made in the instant case because the trial court did not adequately advise her of the perils of proceeding *pro se*. Specifically, she contends that although she was "adequately advised [of the perils of proceeding *pro se*] at her first trial," her conviction should not stand herein because she was not advised a second time of the risks of self-representation in a jury trial. Warr's Br. at 8. We disagree.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to appointed counsel. *Henson v. State*, 798 N.E.2d 540, 544 (Ind. Ct. App. 2003). Under the Sixth Amendment, defendants also have the right to proceed *pro se*. *Id*. "However, before a defendant waives his right to counsel and proceeds *pro se*, the trial court must determine the defendant's waiver of counsel is knowing, voluntary, and intelligent." *Id*.

In determining whether a waiver was knowing, intelligent, and voluntary, we consider the following factors, known as the *Poynter* factors: (1) the extent of the court's inquiry into the defendant's decision; (2) other evidence in the record that establishes

whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to proceed *pro se*. *Poynter v. State*, 749 N.E.2d 1122, 1127-28 (Ind. 2001). Further, whether a defendant's waiver is knowing, intelligent, and voluntary depends on the particular facts and circumstances of the case. *Id*.

We have previously proposed guidelines for trial courts to employ when advising defendants about the perils of proceeding *pro se*. *See Dowell v. State*, 557 N.E.2d 1063, 1066 (Ind. Ct. App. 1990). Since then, our Supreme Court has held that trial courts need not follow those guidelines as a "rigid mandate." *Leonard v. State*, 579 N.E.2d 1294, 1296 (Ind. 1991). "Rather, the trial court must 'acquaint the defendant with the advantages to attorney representation and the drawbacks of self-representation.'" *Henson*, 798 N.E.2d at 544. "The record should establish that the defendant made his choice to proceed *pro se* with his eyes open." *Id*.

"[A]bsent exceptional circumstances, the advisement of warnings is . . . a condition precedent to a defendant's invocation of the right of self-representation . . . ." *Miller v. State*, 795 N.E.2d 468, 469 (Ind. Ct. App. 2003). Notably, the supreme court added,

> [T]here will presumably be exceptional situations where a defendant will make a waiver that is 'knowing and informed' despite the absence of a trial court advisement. A thorough analysis of the *Poynter* factors in each case will bring those exceptional situations to light.

Id. Thus, we proceed to an analysis of the *Poynter* factors.

The first factor involves the extent of the court's inquiry into the defendant's decision to proceed *pro se*. The record reflects that at the onset of Warr's second trial, the trial court reviewed its case file and discovered (1) that advisory counsel Gerber had been appointed to assist Warr in representing herself during the first trial; and (2) that Warr had expressed a desire to represent herself again. On learning this information, the trial court expressly asked Warr if she still intended to represent herself. Warr responded that she did. The trial court did not advise Warr for a second time of the dangers of self-representation. Instead, the trial court judge noted,

> [I]t's my understanding, then, that you will be representing yourself today, but that you will have Mr. Gerber available to you during the trial should you wish to avail yourself of any advice from him. Do you have any questions about the standby counsel or advisory rule [sic] that he has or with regard to that we need to discuss?

(Tr. 377-78). Warr responded that she did not. The trial court noted for the record, and without objection from Warr, that Warr would be proceeding *pro se*.

With respect to the extent of the trial court's inquiry into Warr's decision to proceed *pro se*, we find that this inquiry involved a review of the case file, recognition of the fact that Warr had previously proceeded *pro se* with the assistance of advisory counsel, and pointed questioning to ensure that Warr still intended to proceed *pro se*.

The second *Poynter* factor addresses the existence of any other evidence in the record that establishes that Warr understood the dangers and disadvantages of self-representation. The record reveals that during Warr's first trial, the trial court advised her of the perils of proceeding *pro se*, as evidenced by the following statements: (1) "representing yourself very rarely turns out well" (Tr. 22); (2) "your [sic] disadvantaging

yourself because you, perhaps, and probably don't know [the rules of evidence]" (Tr. 23); (3) advisory counsel is necessary because "you're going to be in such a bind if you don't have somebody to talk to" (Tr. 24); and (4) "I doubt if you are competent to defend yourself because you're not an attorney [']cause you don't know the law." (Tr. 25). The initial trial ended with the jury convicting Warr of disorderly conduct and with the declaration of a mistrial as to resisting law enforcement.

Warr's second trial resulted in her conviction for resisting law enforcement. The two charges were resolved in two trials under a single charging information, cause number, and thus, a single case file. The case file indicated to the second judge that Warr had previously been advised of the perils of proceeding *pro se;* had represented herself during her first trial with assistance from advisory counsel; and intended to proceed *pro se* at the second trial. With this knowledge, the trial judge asked Warr whether she still intended to proceed *pro se*. When Warr responded that she did, the trial court permitted the same advisory counsel to continue to provide assistance to Warr. Although the trial judge did not expressly advise Warr of the perils of proceeding *pro se*, the case history adequately indicates that Warr understood the dangers and disadvantages of self-representation.

We now address the third *Poynter* factor -- Warr's background and experience. Four months after Warr was convicted of disorderly conduct, she stood trial for the sole offense of resisting law enforcement pursuant to the original charging information. Although Warr was carefully advised of the perils of proceeding *pro se*, she elected to represent herself during her first trial, and was convicted. Subsequently, Warr insisted

upon representing herself in her second trial. Based upon these facts, we find Warr's experience to be as follows: (1) she was advised of the dangers of self-representation and elected to proceed *pro se* during her first trial; and (2) merely four months later, she again insisted upon representing herself in her second trial, eschewing opportunities to secure counsel.

The fourth and final *Poynter* factor pertains to the context surrounding Warr's decision to proceed *pro se.* We have addressed this factor at length above and will not reiterate, but rather, incorporate what we have previously stated.

Perhaps the better practice would have been for the trial judge to advise Warr a second time of the perils of proceeding pro se; however, Warr acknowledges that she was adequately advised before the first trial, some four months earlier; and when asked by the trial court if she wanted to proceed *pro se*, Warr responded that she did. That said, given the unique facts and circumstances of this case, we find that there existed substantial evidence in the record to support the conclusion that Warr's waiver was made knowingly and after being adequately advised.

Specifically, the confluence of (1) the inextricably linked trials;[5] (2) the trial judge's careful advisements at the first trial about the dangers of self-representation; (3) Warr's evident comprehension of those perils and her decision to proceed *pro se* at her first trial; and (4) her decision, four months later, to represent herself during her second trial, give rise to the conclusion that Warr's waiver of her right to counsel was

[5] Although different judges presided over the trials, they involved a single charging information, cause number, trial court, and case file.

knowingly, intelligently, and voluntarily made. Warr's contention that she understood the perils of proceeding *pro se* in her first trial, but somehow was wholly ignorant of the same when she asserted her intention to proceed *pro se* four months later (in the instant trial on the same charge), defies logic and common sense. Her contention is made even less credible by Warr's acknowledgment that she "had been adequately advised [of the dangers of self-representation] at her first trial." Warr's Br. 8. We are satisfied that Warr decided to proceed *pro se* with her eyes open to the advantages to attorney representation and the drawbacks of self-representation. Accordingly, we find no Sixth Amendment violation.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.